FILED

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No. 97-97-359 AUG 26 1997

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In The

Supreme Court of the United States

October Term, 1996

C.K. GREENWOOD,

Petitioner,

and

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA,

Intervenor-Petitioner,

vs.

SOCIETE FRANCAISE DE TRANSPORTES MARITIME and INDIAN OCEAN BULK CARRIERS, LTD.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Rules Enabling Act, 28 U.S.C. § 2072, empowers the United States Supreme Court to promulgate rules of civil practice. The Supreme Court's Federal Rules of Civil Procedure thus enforce, among other things, United States citizens' rights under the Seventh Amendment. Rule 8(a) specifically grants to litigants the right to plead in the alternative. This petition presents two questions:

1. Does the federal common law doctrine of judicial estoppel supersede the right to alternative pleading permitted by Rule 8(a)?

2. Does the federal common law doctrine of judicial estoppel, when applied as a bar to alternative pleading otherwise permitted by Rule 8(a), violate the reexamination clause of the Seventh Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

1. Does the federal common law doctrine of judicial estoppel supersede the right to alternative pleading permitted by Rule 8(a)?..... i

2. Does the federal common law of judicial estoppel, when applied as a bar to alternative pleading otherwise permitted by Rule 8(a), violate the reexamination clause of the Seventh Amendment? i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 14

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES

Ergo Science, Inc. v. Martin,
73 F.3d 595 (5th Cir. 1996) 11

Gasperini v. Center for Humanities, Inc.,
___ U.S. ___, 116 S. Ct. 2211 (1996) 12, 13

In re Double D. Dredging Co.,
467 F.2d 468 (5th Cir. 1972) 11

Kramer v. Jenkins,
108 F.R.D. 429 (N.D. Ill. 1985) 13

Scindia Steam Navigation Co. v. De Los Santos,
451 U.S. 156 (1981) 3, 10

STATUTES AND RULES

U.S. Constitution, amendment VII ..... *passim*

Longshore & Harborworkers Compensation Act,
33 U.S.C. § 905(b) 3

Rules Enabling Act, 28 U.S.C. § 2072 ..... 2, 5, 13

Rule 8, Federal Rules of Civil Procedure 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner, C.K. Greenwood ("Greenwood"), respectfully petitions the Supreme Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on April 28, 1997.

OPINIONS BELOW

The Fifth Circuit reported its decision at 111 F.3d 1239. Greenwood reprints that decision in the Appendix. (App. A.) The District Court did not report this case. Greenwood reprints the District Court's Judgment and Order Granting Plaintiff's Motion for Entry of Final Judgment ("Order") in the Appendix. (App. B and C, respectively.) The Fifth Circuit did not report its order denying Greenwood's requests for panel rehearing and rehearing *en banc*. Greenwood reprints that order in the Appendix. (App. D.)

JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on April 28, 1997. (App. A.) Greenwood timely and simultaneously requested panel rehearing and rehearing by the Court *en banc*. (*See* App. D.) The Fifth Circuit denied both requests on May 28, 1997. (*Id.* at 1-2.)

Greenwood invokes this Court's certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Greenwood reprints copies of the Seventh Amendment to the United States Constitution and the Rules Enabling Act, 28 U.S.C. § 2072 (sometimes the "Act") – both of which relate to the issues Greenwood raises here – in the Appendix. (App. E.)

STATEMENT OF THE CASE

Greenwood seeks from this Court resolution of the dilemma created by the Fifth Circuit's decision, which holds that the federal common law doctrine of judicial estoppel supersedes a party's Rule 8, Fed. R. Civ. P., right to plead in the alternative, notwithstanding:

(1) The Rules Enabling Act's mandate that supersession runs the other way – the Act supersedes any laws in conflict therewith; and

(2) The Seventh Amendment's express limitation on courts' ability to "reexamine" civil jury decisions.

A. The District Court Proceedings.

Greenwood, an employee of Boyd-Campbell Stevedoring, Inc. ("Stevedore"), suffered injuries on April 1,

1986, while working as a longshoreman. (App. A at 1242.) Greenwood filed suit in 1988, pursuant to the Longshore & Harborworkers Compensation Act ("LHWCA"), 33 U.S.C. § 905(b). (*See* App. B and C (style reflecting date of filing).) Greenwood and Respondents, Societe Francaise de Transportes Maritime and Indian Ocean Bulk Carriers, Ltd. (the "Shipowners"), tried the case to a jury, commencing on December 9, 1991. (App. C at 1.) Greenwood presented two, different theories of recovery under the LHWCA: either the Shipowners knew of the defect that caused his injuries but kept it hidden from the Stevedore, or both the Stevedore and the Shipowners knew about the defect and the Shipowners knew further that the Stevedore would act improvidently and work on in the face of the defect. The LHWCA provides for both theories of recovery. *See Scindia Steamship Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981).

The jury found for Greenwood, awarding him $3,234,984.00 in damages. Greenwood reprints the jury's answers to the District Court's Special Interrogatories in the Appendix. (App. F.) The District Court remitted $144,891,00. leaving a total judgment of $3,090,093.00. (App. B at 16-17.) The District Court entered judgment, on March 4, 1992, reflecting the jury's verdict and the court's remittitur of some of the damages. (App. B.)

B. The Decision of the Court of Appeals.

The Shipowners filed their notice of appeal in 1992. (App. A.) A three-judge panel of the Fifth Circuit heard oral argument in January of 1993. The panel entered its

decision four years later, on April 28, 1997, reversing and rendering in favor of the Shipowners. (*Id.*)

The panel, by a two to one majority, held – for the first time in federal appellate history – that the federal common law doctrine of judicial estoppel supersedes a party's Rule 8(a) right to plead in the alternative. (111 F.3d at 1248 n.12, App. A at 18 n.12.) The majority did *not* apply judicial estoppel to the Shipowners, however, who likewise had pleaded and proved their defense(s) in the alternative. (111 F.3d at 1250-51 n.2, App. A at 25 n.2 (J. Johnson, dissenting) ("The majority alleges that judicial estoppel precludes Greenwood from relying on Logue's testimony to receive his judgment at trial and turning around on appeal and repudiating that very testimony in an attempt to retain the judgment. *See* 111 F.3d at 1248. [App. A at 18.] Notably though, the Shipowners are essentially doing the same thing.").)

Greenwood timely filed a Petition for Panel Rehearing and a Suggestion for Rehearing *En Banc*. (App. D.) The Fifth Circuit overruled both. (*Id.*)

A judgment of this Court reversing the Fifth Circuit's decision will affirm the District Court's judgment in favor of Greenwood.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision violates both the letter of § 2072 and the philosophy underpinning the Act. Its decision further violates the reexamination clause of the Seventh Amendment.

First, the Fifth Circuit violates the Act itself by applying the federal common law of judicial estoppel to supersede a litigant's Rule 8(a) right to plead in the alternative. The Rules Enabling Act mandates that the Supreme Court's rules of civil procedure take precedence over preexisting, federal common law. The Fifth Circuit's decision reverses this mandate.

Second, the Fifth Circuit's decision creates a conflict between the two clauses of § 2072 by holding that a court of appeals may ignore a rule of civil procedure, properly promulgated by the Supreme Court, in order to apply a federal common law doctrine – here, judicial estoppel. In so doing, the Fifth Circuit creates a back door through which it avoids the Seventh Amendment's prohibition against abridgement and modification of a party's right to trial by jury.

Greenwood pleaded and proved his case to the jury under two theories. The jury rejected the theory he pressed most heavily. The jury accepted by its verdict, however, his alternative theory. According to the Fifth Circuit, and despite the clear language of § 2072, the doctrine of judicial estoppel permits it to reexamine the jury's verdict – and, thus, bars Greenwood the recovery the jury awarded him.

The erroneous and inequitable nature of the Fifth Circuit's opinion raises the two questions that Greenwood presents for a writ of certiorari. First, does the federal common law doctrine of judicial estoppel supersede the right to alternative pleading permitted by Rule 8(a)? Second, does the federal common law of judicial estoppel, when applied to the right to plead alternatively,

violate the reexamination clause of Seventh Amendment? Implicit within these questions are the reasons why the Court should issue such a writ. At the simplest level of inquiry, the Supreme Court's promulgation of Rule 8(a), which superseded the doctrine of judicial estoppel, as applied and understood by the Fifth Circuit, stands ignored by the Fifth Circuit's decision. The Supreme Court should protect its authority to regulate federal civil procedure.

At a more complex and philosophical level of inquiry, the majority's decision confounds, rather than resolves, any tension within the Rules Enabling Act as applied to federal question cases. The decision creates a back door through which appellate courts can enter and abridge and modify jury verdicts. This Court should act swiftly to protect the Seventh Amendment by preventing future courts of appeal, as well as the Fifth Circuit here, from reexamining jury verdicts under the guise of judicial estoppel analysis.

A. Brief Factual Background – Both Greenwood and the Shipowners Pleaded and Proved Their Respective Claims and Defenses by Alternative Theories.

Greenwood contended at trial and on appeal that either:

(1) The Shipowners had actual knowledge of the open and obvious danger of the defect causing his injury, as well as of the Stevedore's improvident judgment in working in the face of that defect, and so were liable for Greenwood's injuries; or

(2) The Shipowners failed to warn the Stevedore, upon turning over the ship, of hidden defects about which the Shipowners knew or should have known, and so were liable for Greenwood's injuries.

(111 F.3d at 1246-49, App. A at 15-19.) Both Rule 8(a) and this Court's decision in *Scindia Steam,* 451 U.S. at 156, permitted (and permit) Greenwood to plead alternatively in this fashion.

The Shipowners likewise pleaded in the alternative. They contended at trial and on appeal that either:

(1) No defect existed; or

(2) If a defect existed, the Shipowners had no knowledge of it; or

(3) If a defect existed and the Shipowners had knowledge of it, they had no knowledge of the Stevedore's improvident judgment to continue working in the face of such a defect.

(111 F.3d at 1249-52, App. A at 19-23.)

The District Court instructed the jury as to the hidden danger theory. Greenwood reprints the Court's Instructions to the Jury ("Instructions") in the Appendix. (App. G. at 3.) The District Court also instructed the jury as to the actual knowledge/open and obvious theory. (App. G at 4.) The jury ruled for Greenwood.

The Shipowners contested by motion for judgment notwithstanding the verdict, whether Greenwood proved his hidden danger theory. The District Court Order denied their motion noting:

> Defendants say the jury's verdict is insufficient [sic] because it does not contain a finding that the alleged hazardous condition of the crane was not an obvious or reasonably anticipated hazard. [. . .] The Court's instructions to the jury included the following: "In order to prevail on this claim, Plaintiff C.K. Greenwood must prove by a preponderance of the evidence that: [. . .] the hazard was one which the Plaintiff's employer, the stevedore, did not know about, and which would not be obvious to or anticipated by a reasonably competent stevedore in the performance of his work." [. . .] *Under the instructions of the Court, the jury found: [. . .] the hazard was not obvious to or anticipated by the stevedore[.]*

(App. C at 7-8 (emphasis added).) The District Court thus agreed with the jury's verdict and decided Greenwood had proved his claim.

The evidence upon which the District Court predicated its decision was as follows. Greenwood offered at trial the testimony of Logue, a longshoreman who was present at the time of the accident and was operating Crane No. 4. Logue claimed the defect at issue was open and obvious. The Shipowners roundly discredited Logue on cross-examination. Greenwood also presented testimony by longshoreman Polinard as to the open and obvious nature of the defect. (The majority chose to fix its decision, however, only on Logue's testimony. Greenwood presented to the panel a chart in his rehearing papers, detailing, among other things, Polinard's testimony in order to demonstrate fully the conflicting nature of all of the testimony elicited at trial. Greenwood reprints that chart in the Appendix. (App. H.))

The Shipowners adduced the testimony of six other witnesses. All were employees of the Stevedore and were present working on Crane No. 4 at the time of the accident. To a man, they testified that they knew of no problem with the crane at the time of the accident and, therefore, that the defect was hidden. At the conclusion of the evidence, the District Court instructed the jury on the two alternative theories of liability. The jury thus weighed the credibility of Logue, who was discredited and impeached, as well as Polinard, against the testimony of the six longshoremen adduced by the Shipowners.

B. The Fifth Circuit Applied Its Judicial Estoppel Analysis Selectively – It Penalized Greenwood, and Not the Shipowners, for Alternative Pleading.

The panel majority held, notwithstanding the evidence that Greenwood and the Shipowners put forward as to both theories, it could consider only the evidence Greenwood put forth in support of the open and obvious danger theory. (111 F.3d at 1247-49, App. A at 16-19.) As to Greenwood's alternative theory of recovery, the hidden danger theory, the majority held that because Greenwood's counsel had relied heavily in his arguments to the jury (as well as on appeal) on the testimony supporting the open and obvious theory, the doctrine of judicial estoppel barred Greenwood from recovering under his pleaded and proved theory of hidden danger. (111 F.3d at 1248 n.12, App. A at 18 n.12.)

In short, then, the majority held that the federal common law doctrine of judicial estoppel superseded

Greenwood's right to plead and prove – to try – alternative theories to a jury. This decision does not square with the Act's express mandate that, "All laws [such as the doctrine of judicial estoppel] in conflict with such rules [as Rule 8(a)] shall be of no further force or effect after such rules have taken effect." Section 2072(b).

Judge Johnson, recognizing the error in this result, dissented:

> The majority alleges that judicial estoppel precludes Greenwood from relying on Logue's testimony to receive his judgment at trial and then turning around on appeal and repudiating that very testimony in an attempt to retain the judgment. . . . Notably, though, the Shipowners are essentially doing the same thing. At trial, the Shipowners attempted to discredit Logue's testimony at every turn. Now on appeal, the Shipowners claim that Logue's testimony is correct and ask this court to disregard all of the evidence and testimony that the Shipowners provided at trial contradicting Logue.

(111 F.3d at 1250-51, n.2, App. A at 25-26, n.2.) Judge Johnson further noted that seven other witnesses' testimony supported Greenwood's verdict under the hidden danger theory, yet the majority chose to ignore this evidence. (*Id.*)

C. The Supreme Court Should Resolve the Confusion the Fifth Circuit's Decision Creates as to the Issue of How the Rules Enabling Act Applies to Federal Common Law When it Conflicts With a Federal Rule of Civil Procedure.

Federal tort law, such as the LHWCA, requires the development of federal common law. *See, e.g., Scindia*

Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 165-66 & n.13 (1981). Federal tort law, however, also is subject to the Federal Rules of Civil Procedure. The Rules Enabling Act mandates that the Federal Rules supersede all federal common law *except* when such laws constitute a substantive right. An initial issue, then, is whether the doctrine of judicial estoppel creates in litigants a substantive right.

Judicial estoppel is, of course, an equitable rule of practice. *See, e.g., Ergo Science, Inc. v. Martin*, 73 F.3d 595, 600 (5th Cir. 1996) ("Whether this reliance is labeled as 'waiver,' 'judicial estoppel,' or 'renunciation' is immaterial. What is clear is that the district court, *as a matter of federal procedure*, is entitled to rely on statements made by counsel in open court." (emphasis added)), and *In re Double D. Dredging Co.*, 467 F.2d 468, 469-70 (5th Cir. 1972) (holding that when a district court effectively consolidates two separate actions into a single lawsuit, and when the same parties and same transaction are at issue in both actions, a party making an allegation in one action is bound by that allegation in the other action).

Judicial estoppel thus does not create a substantive right (particularly, here where both parties pleaded and proved their cases in the same manner – alternatively, pursuant to Rule 8(a)). The Act mandates that the Federal Rules of Civil Procedure supersede this doctrine. Accordingly, Greenwood had every right to plead and prove his case in the alternative, as did the Shipowners. The Fifth Circuit's decision to apply judicial estoppel here was in derogation of Greenwood's rights.

D. The Fifth Circuit's Decision Disregards the Supreme Court's Authority to Regulate Civil Trials and Thus Violates the Seventh Amendment.

The Supreme Court promulgates all rules of civil procedure pursuant to the Rules Enabling Act, which, in turn, provides:

> Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(App. E [§ 2072(b)] (reflecting the 1988, "supersession" amendment).) Some tension between the two provisions of § 2072(b) exists in that, while a law in conflict with rules promulgated pursuant to the Act "shall be of no further force or effect," at the same time, substantive rights *shall* remain in force and effect, regardless of such rules' promulgation. Again, the initial question becomes: Is the law at issue a substantive right? If the law at issue creates a substantive right, it supersedes any rule passed pursuant to the Act. If the law does *not* create a substantive right, however, then the Supreme Court's properly promulgated rule controls.

In *Gasperini v. Center for Humanities, Inc.*, ___ U.S. ___, 116 S. Ct. 2211 (1996), albeit a diversity case, the Supreme Court noted that:

> Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor. . . . Concerning matters covered by the Federal Rules of Civil Procedure, the characterization is usually unproblematic: It is settled that if the Rule in point is consonant

> with the Rules Enabling Act [ ], and the Constitution, the Federal Rule applies regardless of the contrary state law.

Id. at 2219 & n.7 (citations omitted). This analysis should also apply in federal question cases. *See Kramer v. Jenkins*, 108 F.R.D. 429, 431 (N.D. Ill. 1985) (observing that the supersession clause of § 2072 requires that, in such a conflict, a rule passed pursuant to the Act controls).

As opposed to the doctrine of judicial estoppel, the Seventh Amendment provides United States citizens, such as Greenwood, precisely the kind of substantive right that the Rules Enabling Act seeks to protect. As *Gasperini* observes, "The Seventh Amendment . . . bears not only on the allocation of trial functions between judge and jury . . . ; it also controls the allocation of authority to review verdicts, the issue of concern here." *Gasperini*, 116 S. Ct. at 2222. In other words, the second clause of the Seventh Amendment ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (App. E.)) bars reexamination of jury verdicts except in narrow circumstances. *See Gasperini*, 116 S. Ct. at 2222-23. Because "trial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' . . . while appellate judges see only the 'cold paper record,' " the Seventh Amendment constrains appellate review more closely than trial court's review. *Id.* (citations omitted).

In applying the doctrine of judicial estoppel to Greenwood's otherwise indisputable right to plead and prove his case in the alternative, the Fifth Circuit has backdoored the Seventh Amendment's reexamination

prohibition. It does so by defying the Rules Enabling Act's supersession doctrine and ignoring the Supreme Court's promulgation of Rule 8(a). Once freed of these two strictures, the Fifth Circuit reexamines the jury's verdict for Greenwood by disregarding the record evidence in support thereof. This is not merely an infringement of Greenwood's rights, this is a slap in the face of the jurors who performed their civic duty with caring and careful consideration. The Court should correct this misstatement of law by issuing a writ of certiorari to the Fifth Circuit in order for the Court to examine thoroughly these important issues.

CONCLUSION

The Supreme Court should grant a writ of certiorari to correct constitutional error and restore the primacy of the Federal Rules of Civil Procedure over federal common law pleading doctrines. The result of the Fifth Circuit's decision has cataclysmic implications for the Seventh Amendment. The Fifth Circuit's decision does more than take from Greenwood, an elderly, law-abiding, hard-working, single, African-American father who raised his children in the church, his right to civil jury trial. It is precedent for all appellate courts to reexamine jury verdicts *selectively*. For, as Judge Johnson observed, only Greenwood fell prey to judicial estoppel; the Shipowners, whose conduct was identical, now walk away with no obligation to the man whose livelihood they took. The message of the Fifth Circuit's decision is plain: We will reexamine jury verdicts selectively, ignoring any federal rule of civil procedure, regardless of whether doing

so conflicts with the Rules Enabling Act, and regardless of the Supreme Court's promulgation of such rules of civil procedure, under the guise of federal common law analysis. This position is in defiance of the Rules Enabling Act, the Seventh Amendment, and this Court's authority.

Respectfully submitted,

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August 26, 1997

APPENDIX

Fifth Circuit's Decision A1
District Court's Judgment..... B1
District Court's Order Denying Motion for J.N.O.V.... C1
Fifth Circuit's Denial of Rehearing Petitions..... D1
Seventh Amendment and Rules Enabling Act E1
District Court's Special Interrogatories F1
District Court's Instructions to Jury..... G1
Evidence Chart..... H1

APPENDIX "A"

C.K. GREENWOOD, Plaintiff-Appellee,

National Union Fire, Intervenor-Plaintiff-Appellee,

v.

SOCIETE FRANCAISE DE, et al., Defendants,

Societe Francaise De, and Indian Ocean Boat Carriers, Defendants-Appellants.

No. 92-7224.

United States Court of Appeals,
Fifth Circuit.

April 28, 1997.

Longshoreman who was injured when slewing brake on ship's crane malfunctioned brought suit against shipowners under negligence provision of the Longshore and Harbor Workers' Compensation Act (LHWCA). The United States District Court for the Southern District of Texas, Eduardo E. de Ases, United States Magistrate Judge, entered judgment on jury verdict for longshoreman, and shipowners appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) shipowners' objections to jury charge were sufficient approximation of renewed motion for directed verdict to support their later motion for judgment notwithstanding the verdict (JNOV); (2) owners could not be held liable for breach of turnover duty to warn of hidden defect, since defective slewing brake was open and obvious defect; and (3) owners were not liable on theory they breached duty to intervene in stevedore operations, absent evidence that shipowners

had actual knowledge that operation of crane with defective slewing brake created unreasonable risk of harm to expert longshoremen such that continued use of crane by stevedore was "obviously improvident."

Reversed and rendered.

Johnson, Circuit Judge, filed dissenting opinion.

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Kathleen Krail Charvet, McGlinchey, Stafford & Lang, New Orleans, LA, for Intervenor-Plaintiff-Appellee.

Edward D. Vickery, Royston, Rayzor, Vickery & Williams, Houston, TX, Ralph F. Meyer, Royston, Rayzor, Vickery & Williams, Corpus Christi, TX, for Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas.

Before JOHNSON, GARWOOD and JONES, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellee C.K. Greenwood (Greenwood) brought this suit against defendants-appellants Indian Ocean Bulk Carriers and Societe Francaise de Transportes Maritime (collectively, the Shipowners), pursuant to section 5(b) of the Longshore & Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 905(b), for injuries

Greenwood received while unloading the Shipowners' vessel. The jury found in Greenwood's favor, and the magistrate judge conducting the trial rendered judgment for Greenwood. The Shipowners now timely appeal, alleging, *inter alia*, that there was insufficient evidence to sustain the jury's verdict. We agree and accordingly reverse the judgment in favor of Greenwood and render judgment for the Shipowners.

Facts and Proceedings Below

On April 1, 1986, in Corpus Christi, Texas, the Shipowners turned over their vessel, M/V PENAVAL, to a stevedore which employed longshoremen to discharge the ship's cargo for that day and for the next three days. During that first day of operations, Greenwood worked as a member of a gang of longshoremen who were assigned to unload a cargo of pipe from a hatch on the deck of the vessel onto third-party trucks located on the dock. The longshoremen commenced their cargo operations around 7:00 a.m., and they used the ship's crane number four (as well as other of its cranes) to assist in discharging the pipe. The longshoremen had attached the stevedore's cargo discharging gear to the crane's hook. This gear consisted of a spreader bar that had cables on each end equipped with cargo hooks. The longshoremen attached the cargo hooks to each end of a joint of pipe. Since there were three cables and hooks on each end of the spreader bar, the longshoremen could transport three joints of pipe at a time. The spreader bar also had tag lines, which consisted of lengths of rope that were used for guiding the joints of pipe to the waiting truck beds. The longshoremen's utilization of the cranes in the

unloading operation was carried out without any supervision or intervention by the ship's crew.

During the morning of April 1, the number four crane was operated by longshoremen Kenneth Logue (Logue) and Wayne O'Neal (O'Neal), who worked alternating one-hour shifts. Concerning the time relevant to this case, Logue worked the first shift from 7:00 a.m. to 8:00 a.m., and he worked the shift from 9:00 a.m. to 10:00 a.m.; O'Neal worked the 8:00 a.m. to 9:00 a.m. shift. A few minutes after 9:00 a.m., Logue had just unloaded three points of pipe onto a truck bed and was swinging the crane's boom back over the ship for another load when one of the tag lines got hung up on something, apparently the truck. Logue testified that he attempted to halt the horizontal movement of the crane with the crane's slewing brake in order to ease the tension in the tag line. He further testified that the slewing brake – which controls the crane's horizontal movement – malfunctioned and the crane continued to move in a horizontal direction. The tag line then broke, causing the spreader bar and cargo hooks to swing outward. Greenwood was struck in the face with one of the swinging cargo hooks. No report was made to the ship about the accident, and the crane continued to be used without interruption by the two operators. Then, at approximately 11:30 a.m., the crane's boom brake – which controls the vertical movement of the crane – began to malfunction. The ship's log indicates that this malfunction was due to a break in the boom brake's socket lining that occurred while the crane was in operation, but it was "[c]aught right in time" and the crane was immediately shut down for repairs. The longshoremen crew received

full compensation during the half hour of their work schedule that the crane was shut down. After the ship repaired the crane's boom brake, it continued to be used without incident that afternoon and for the remainder of the unloading operations.

Greenwood subsequently brought this suit against the Shipowners for the injuries he suffered as a result of being struck by the swinging cargo hook. At trial, the evidence revealed that all of the cranes' brakes were inspected on March 20, 1986. A report from that inspection showed that one of the slewing brakes on crane number four had been replaced with a part that was "not recommended." The operating condition of the crane's other slewing brake was described as being in "slight doubt."[1] The Shipowners did not inform the stevedore that anything might be wrong with the number four crane when they relinquished control of the vessel.

Logue, who was Greenwood's first witness, testified on direct examination that at the time of the accident he had been a longshoreman for thirty-two years and had operated cranes for twenty-five or twenty-six years. He stated that when he first started operating the crane at

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[1] Greenwood also presented the Shipowners' journal entries describing the poor condition of the crane's roller electric cable, and the fact that "[f]rom beginning of work of cranes in Corpus Christi the socket of boom brake on crane 4 was not functioning properly." There is no evidence that any of these defects were related to the allegedly malfunctioning slewing brake which is claimed to have caused Greenwood's injuries. Logue testified there was no problem with the boom brake during the period of his operation described in his testimony.

7:00 a.m., he immediately realized that as to the horizontal or slewing motion it was "a little jerky" and "when you did start slewing, you put it back in neutral, it would continuously kept [sic] slewing for a little ways."[2] He explained, "If it keeps slewing, then you have got to try to adjust for it," and, "If it's not functioning properly then you try to allow yourself for that – for whatever might be wrong with it." He agreed that a crane operator, in his experience, can operate a crane even though it has a defect unless "it is too rough, if it's too bad . . . then you're going to get off of that crane. I know I'm going to do it." Logue testified that at 8:00 a.m. he reported the slewing-brake defect to his gang foreman, Quincy V. Guilford (Guilford), but made no other report concerning the crane. There is no evidence to suggest that the Shipowners were ever notified about the problem with the slewing brake's operation.[3] After the accident, Logue continued to use the crane although the slewing brake was not then or thereafter repaired.

At the close of Greenwood's case, the Shipowners made a motion for directed verdict on the basis, among others, that they had no duty to warn of dangers with regard to the slewing brake, because the stevedore and longshoremen tested the ship's crane before using it in

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[2] George Polinard (Polinard) corroborated this testimony. Polinard, another longshoreman who had frequently served as a crane operator, testified that he "observed that all of the cranes were not smooth at all, very jerky in their motions."

[3] This view is supported by Guilford who testified that he did not remember Logue informing him about the defective slewing brake (or any defect in the crane). He stated that he did not know about the defective slewing brake and did not inform his superior (the walking foreman) or the Shipowners about it.

unloading and knew of the slewing brake's defect, and there was no evidence the Shipowners had actual knowledge that the crane was malfunctioning to such an extent that the stevedore's decision to continue using it was obviously improvident. The magistrate judge denied the Shipowners' motion for a directed verdict.

The Shipowners then presented their evidence and Greenwood offered his rebuttal evidence. The Shipowners did not renew their motion for directed verdict at the close of all the evidence. They did, however, timely object to the proposed jury charge based on the same grounds of insufficient evidence. This objection was also overruled.[4] Subsequently, the jury returned its verdict

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[4] Specifically, after the magistrate judge had completed preparation of the proposed charge, and before it was read to the jury, the following colloquy occurred between Mr. Meyer (the Shipowners' attorney) and the court:

> "Mr. Meyer: . . . I feel compelled, because I have raised a motion to dismiss and a motion for a directed verdict, I must also ask the Court to not submit the issues asking whether there was a reasonably dangerous condition, Issue No. 1. Whether the plaintiffs knew or should have discovered that the crane was unreasonably dangerous, Issue 2. Issue No. 3 as the Court has set it out. And Issue No. 4, negligence as to the defendants. On the grounds that there is no evidence or insufficient evidence to justify submission of those issues to the jury.
>
> The Court: All right. Anything else?
>
> Mr. Meyer: I would also – no, Your Honor.
>
> The Court: Very Well. The defendant's objections are overruled and request for additional instructions denied."

Issues One and Two inquired whether the crane was unreasonably dangerous when the Shipowners turned it over to

finding the Shipowners were negligent and $3,234,984 in damages. The magistrate judge ultimately remitted $144,891 of this amount, resulting in a final judgment of $3,090,093. Following the verdict, the Shipowners filed a motion for judgment notwithstanding the verdict (JNOV),[5] raising the same arguments as they had presented in their motion for directed verdict that there was insufficient evidence that they had breached their duties of care to Greenwood. The magistrate judge denied this motion as well. The Shipowners now timely appeal, arguing, *inter alia*, that the magistrate judge erred in not granting their motions based on the insufficiency of the evidence.

Discussion

I. Motion for Directed Verdict

Greenwood argues that although the Shipowners made a motion for directed verdict – which was denied – at the close of the plaintiff's case, they failed to reurge the motion at the close of all of the evidence. Therefore, he contends that under Federal Rule of Civil Procedure

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the stevedore, and whether the Shipowners knew or should have known that. Issue Three asked if the hazard was one which was likely to be encountered by the stevedore. Issue Four inquired whether the Shipowners' negligence, if any, proximately caused Greenwood's injuries. These were the only liability issues; all were answered favorably to Greenwood.

[5] Effective December 1, 1991, Rule 50 of the Federal Rules of Civil Procedure was amended. Under the thus amended Rule 50, the "motion for directed verdict" and "motion for JNOV" are called "motions for judgment as a matter of law." The trial in this case took place before the effective date of that amendment.

50(b), the Shipowners' insufficient-evidence claims cannot be reviewed on appeal.

"It is well-established law that the sufficiency of the evidence is *not reviewable on appeal* unless a motion for directed verdict was made in the trial court at the conclusion of all the evidence." *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 671 (5th Cir.1993) (citing *Hall v. Crown Zellerbach*, 715 F.2d 983, 986 (5th Cir.1983)). "Where this prerequisite has not been satisfied, a party cannot later challenge the sufficiency of the evidence either through a j.n.o.v. motion or on appeal." *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir.1983), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984).[6]

However, this Court has not required strict compliance with Rule 50(b) and has excused technical noncompliance where the purposes of the requirement have been satisfied. *See, e.g., Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 888 n. 3 (5th Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1985);

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[6] This requirement serves two purposes: (1) "to ensure that the trial court is invited to reexamine only the question raised by the motion for a direct verdict – whether the evidence is sufficient as a matter of law – and not to reexamine the facts properly found by the jury"; and (2) "to avoid making a trap of the judgment n.o.v. when the defendant's nonrenewal [of its directed verdict motion] is designed to avoid pointing out the defects in the plaintiff's proof, especially defects exposed by the defendant's case-in-chief, which the plaintiff might cure before the case is submitted to the jury." *Miller v. Rowan Cos.*, 815 F.2d 1021, 1025 (5th Cir.1987); *see also Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1137 (5th Cir.1991); *Merwine v. Board of Trustees*, 754 F.2d 631, 634 (5th Cir.), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62 (1985); *Bohrer*, 715 F.2d at 217.

Villanueva v. McInnis, 723 F.2d 414, 417-18 (5th Cir.1984); *Bohrer*, 715 F.2d at 216-17; *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1025 (5th Cir.1979); *Jack Cole Co. v. Hudson*, 409 F.2d 188, 191 (5th Cir.1969); *Roberts v. Pierce*, 398 F.2d 954, 956 (5th Cir.1968). As noted in *Bohrer:*

> " 'It is certainly the better and safer practice to renew the motion for directed verdict at the close of all the evidence, [however,] the application of Rule 50(b) . . . should be examined in the light of the accomplishment of its particular purposes as well as in the general context of securing a fair trial for all concerned in the quest for truth.' " 715 F.2d at 217 (alterations in original omitted) (quoting *Bonner v. Coughlin*, 657 F.2d 931, 939 (7th Cir.1981)).

These purposes are met when the court and the plaintiff are alerted to the grounds on which the defendant contends the evidence is insufficient prior to the submission of the case to the jury. *See Miller*, 815 F.2d at 1025; *Merwine*, 754 F.2d at 635.[7]

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[7] Although we will allow an objection or combination of objections to the charge to serve as the functional equivalent of a formal motion for directed verdict, *see Wells v. Hico ISD*, 736 F.2d 243, 251-52 (5th Cir.1984), *cert. dismissed*, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985), that functional equivalent must still satisfy our requirement that "a party may not base a motion for judgment n.o.v. on a ground that was not included in a prior motion for directed verdict." *Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1401 (5th Cir.1986) (citing *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835 (5th Cir.1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976)). Therefore, the grounds that a defendant urges in its JNOV motion and on appeal as a basis for its contention that it is entitled to judgment as matter of law must be presented in the defendant's functional equivalent of a

Our cases stand for the proposition that where a defendant has made a motion for directed verdict at the close of the plaintiff's case for insufficient evidence on specified grounds, and objects on those same grounds to the jury charge, this suffices to support a JNOV motion based on those same grounds.[8] Therefore, we hold that the Shipowners' objections to the charge "were a sufficient approximation of a renewed motion for directed verdict to support [their] later motion for judgment notwithstanding the verdict. To deny entertainment of [their] motion would be to 'succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.' " *Villanueva*, 723 F.2d at 418 (quoting *Quinn*, 597 F.2d at 1025).

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motion for directed verdict. *See Hinojosa v. City of Terrell*, 834 F.2d 1223, 1228 (5th Cir.1988), *cert. denied*, 493 U.S. 822, 110 S.Ct. 80, 107 L.Ed.2d 46 (1989). The issues concerning duty of care which were raised in the Shipowners' directed-verdict motion were also raised in their objections to the jury interrogatories, and in their JNOV motion.

[8] We do not suggest that this is the only procedure that will serve as the functional equivalent of a proper motion for directed verdict. Other procedures may also be acceptable as long as they fulfill the purposes behind Rule 50(b). *See, e.g., Wells v. Hico ISD*, 736 F.2d 243, 251-52 (5th Cir.1984), *cert. dismissed*, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985) (reviewing insufficiency of the evidence where defendant only objected to the submission of the interrogatory as not supported by the evidence, but made no motion for directed verdict); *Villanueva*, 723 F.2d at 418. However, one essential aspect of any procedure is that at some time prior to the submission of the jury charge and the start of the jury's deliberations, the opposing party and the court are adequately notified of the objections of the party who subsequently challenges the verdict. *See McCann*, 984 F.2d at 672; *Seidman*, 923 F.2d at 1137-38.

II. The Shipowners' Duties

The Shipowners' argument hinges on *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). The *Scindia* court articulated the scope of a vessel's duty under section 5(b). "The basic principle which emerges from *Scindia* is that the primary responsibility for the safety of the longshoremen rests upon the stevedore." *Randolph v. Laeisz*, 896 F.2d 964, 970 (5th Cir.1990). However, vessel liability may still arise in three instances:

> "1) if the vessel owner *fails to warn* on turning over the ship *of hidden defects* of which he should have known.
>
> 2) for injury caused by hazards under the control of the ship.
>
> 3) if the vessel owner fails to intervene in the stevedore's operations when he has *actual* knowledge both of the hazard and that the stevedore, in the exercise of 'obviously improvident' judgment, means to work on in the face of it and therefore cannot be relied on to remedy it." *Pimental v. LTD Canadian Pacific Bul*, 965 F.2d 13, 15 (5th Cir.1992) (citing *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 897 (5th Cir.1989)) (emphasis added).

The Shipowners contend that the magistrate judge erred in denying their motions for directed verdict and JNOV because Greenwood did not present sufficient evidence from which a reasonable jury could find the Shipowners liable under *Scindia*.

In reviewing the sufficiency of the evidence, we "consider all of the evidence – not just that evidence which supports the nonmovant's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir.1982) (en banc). The jury's verdict must be upheld unless "the facts and inferences point so strongly and overwhelmingly in favor of" the movant for directed verdict "that the Court believes that reasonable men could not arrive" at a verdict against the movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc). "A mere scintilla of evidence is insufficient to present a question for the jury." *Id.* However, "If there is substantial evidence . . . of such quality and weight that reasonable and fairminded persons in the exercise of impartial judgment might reach different conclusions" then a directed verdict is not proper. *Maxey*, 665 F.2d at 1371.

The Shipowners argue, among other things, that there is insufficient evidence to support the jury's verdict that the defect in the crane's slewing brake was hidden, thus negating their first duty under *Scindia*. The Supreme Court held that the first duty extends to:

> "[E]xercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely

> be encountered by the stevedore in the course of his cargo operations and *that are not known by the stevedore* and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden dangers which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman." *Scindia*, 451 U.S. at 167, 101 S.Ct. at 1622 (emphasis added).

Under this duty, a plaintiff must first show that the vessel owner had actual knowledge of the defect. However, "If the condition existed from the outset, the shipowner is charged with actual knowledge of the dangerous condition." *Hernandez v. M/V Rajaan*, 841 F.2d 582, 586 (5th Cir.1988) (citing *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir.1984)); *see also Pimental*, 965 F.2d at 17 n. 4. Logue testified that he noticed the defect in the slewing brake as soon as he began operating the crane, and this, arguably enhanced slightly by the ship's log's listing of the slewing brake as being in "slight doubt," constituted substantial evidence that the defect in the slewing brake existed before the stevedore received custody of the ship. On this basis, it could be found that the Shipowners were charged with knowledge of the defect. However, the mere fact that the Shipowners may be chargeable with knowledge of the defect does not end our inquiry under the first duty.

"[T]he defendant has not breached its duty to turn over a safe vessel if the defect causing the injury is open and obvious and one that the longshoreman should have seen." *Pimental*, 965 F.2d at 16; *see also Polizzi v. M/V Zephyros II Monrovia*, 860 F.2d 147, 149 (5th Cir.1988); *Morris v. Compagnie Maritime Des Chargeurs Reunis, S.A.*, 832 F.2d 67, 71 (5th Cir.1987), *cert. denied*, 485 U.S. 1022, 108 S.Ct. 1576, 99 L.Ed.2d 891 (1988). If the longshoreman knew of the defect, then it is considered open and obvious. *Pimental*, 965 F.2d at 16 (finding that the defects were obvious based on the testimony of two crane operators who stated that the defects were immediately noticeable). *See also, e.g., Burchett v. Cargill, Inc.*, 48 F.3d 173, 179 (5th Cir.1995). Here, Logue testified on direct examination, and reiterated on cross examination, that as soon as he began operating the crane, he became aware of the defective slewing brake. Furthermore, Polinard, another longshoreman experienced in crane operation, testified that he was able to visually observe this defect in the crane's functioning. Therefore, whatever latent characteristics the alleged defect may have had before the longshoremen began to operate the crane, they became open and obvious before the end of the first (7:00 to 8:00 a.m.) shift during which Logue operated the crane. *See Scindia*, 451 U.S. at 167, 101 S.Ct. at 1622 (a vessel's duty to warn extends only to defects "that are not known by the stevedore and which would not be obvious to or anticipated by him if reasonably competent in the performance of his work").[9]

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[9] In *Scindia*, a winch was being used to lower cargo from a pallet into the ship's hold. 451 U.S. at 159, 101 S.Ct. at 1618. The

The defense did indeed present evidence, in the form of testimony by O'Neal, Guilford, and others, to the effect that the crane in question did not malfunction as Logue had claimed and indicating that the accident was either due to Logue's improper operation of it or to the truck in which the tag-line was caught driving off, causing the line to break, or to some combination of these. If this defense evidence were credited, however, the Shipowners would be entitled to judgment. Conversely, Logue's testimony was essential to Greenwood's case, and without it there would be no substantial evidence that Greenwood's injury was caused by a defect in the crane existing when the vessel was turned over to the stevedore. Greenwood's counsel has consistently recognized this and based his case on Logue's testimony.[10] There is really nothing apart

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winch's braking mechanism was defective, and as a result the brakes would not quickly stop the descent of the winch. Although this defect was not visibly discernible, it was readily noticeable once the stevedore began operating the winch. *Id.* Therefore, the *Scindia* court found that the ship had "no duty or responsibility with respect to the ship's winch, which, if defective, was obviously so." *Id.* at 174, 101 S.Ct.at 1625.

[10] In his opening statement to the jury, Greenwood's counsel stated Logue would testify that when he started using the crane at 7:00 a.m. on April 1, "as soon as he began moving the pipe . . . the brakes on the crane didn't work" and "you'll hear from him [Logue] that this was not a condition that started after they started unloading the ship. It wasn't something that broke. It was that way right from the start of the use of this crane."

Similarly, in his opening final jury argument, Greenwood's counsel relied on Logue's testimony, stating, *inter alia:*

> "What we know in this case is that, first, the best person – the person in the best position to know

from this. Greenwood's only meaningful liability witnesses were Logue and Polinard, whose testimony merely tended to corroborate Logue's.[11] There was no expert testimony that the crane's slewing brake was defective –

> exactly what happened the day of this accident is Mr. Kenneth Logue. . . . And what we do know is that Mr. Logue was very clear and very straight in his testimony, he didn't waver at all, that this crane did not work right from the start, that it never worked right all the way up to the time of the accident, and that this crane on this ship caused this accident."

And, Greenwood's counsel ended his closing final jury argument by stating "this crane was not safe from the start, Mr. Logue told you over and over."

On appeal, Greenwood continues to rely on Logue's testimony, stating in his brief in this Court, among other things:

> "Kenneth Logue, the crane operator of crane number four at the time of the accident, was a 'gold star,' which is the highest class ranking among longshoremen. . . . On the morning of Greenwood's accident, he began working crane number four at 7:00 a.m. . . . Immediately, he noticed that the crane was not functioning properly; it was 'jerky,' and when put into neutral, it would continue to slew, or drift. . . .
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> When he was relieved from his first shift at 8:00 a.m., Logue informed his gang foreman, Quincy Guilford, that the crane was not functioning properly. . . . When he returned to work the 9:00 a.m. shift, however, he noticed no differnece [sic] in the manner in which the crane was operating. . . .
>
> Logue's testimony was corroborated by the testimony of George Polinard,. . . . "

[11] Greenwood himself testified, but essentially had no information concerning the cause of the accident; Armistead, a rebuttal witness who was working with another gang and had never operated a crane, gave *no significant testimony.*

indeed, there was expert testimony that it was not – and there was no testimony as to any examination of the crane reflecting such a defect. There are only two versions of the condition of the slewing brake and its relation to the accident: Logue's version, that the crane's slewing brake from the very beginning never functioned properly, and the version of O'Neal and the defense witnesses that the slewing brake functioned acceptably and the accident was due to operator error and/or the truck's driving off with the hung up tag line. The record suggests no third version. Greenwood supported, and supports, Logue's version, as he must.[12] But under it, the first *Scindia* duty does not apply.

Greenwood argues that just because the danger is "obvious" does not necessarily offer a complete defense to a longshoreman's suit, and that the shipowner is still liable if the longshoreman's "only alternatives when facing an open and obvious hazard are unduly impracticable or time-consuming." *Pimental*, 965 F.2d at 16 (citing *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 167 (5th Cir.1990); *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 378 (5th Cir.1988)). Greenwood contends that Logue had no alternative but to continue to use the crane because when

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[12] Indeed, Greenwood could not procure a verdict and judgment thereon on the basis of Logue's testimony and then on appeal seek to sustain that verdict and judgment by repudiating that very testimony. *See, e.g., Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir.1996) ("judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same . . . proceeding"); *In the Matter of Double D Dredging Co.*, 467 F.2d 468 (5th Cir.1972). *See also Scott v. District of Columbia*, 101 F.3d 748 (D.C.Cir.1996).

machinery breaks down, as the longshoremen are normally told to "milk it along." This observation concerning cargo operations in general cannot substitute for evidence that such was the case in this particular instance. Greenwood presented no evidence that Logue was instructed to continue to use the crane despite the defect or that he would "face trouble for delaying the work." *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir.1986) (quoting *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir.1983)). In fact, when the boom brake on the crane later began to malfunction, the crane was immediately shut down for half an hour and the longshoremen were paid for that dead time. This tends to show that when the Shipowners learned of a problem with the crane, operations would cease until the crane was repaired. Certainly, that alternative was not impracticable, and even if the repairs required some time, the longshoremen would be paid for the resulting down time. *See Teply*, 859 F.2d at 378 ("Ship owners are not liable for obvious dangers that injure contractors aboard their vessels unless the contractors, in order to avoid the danger, would be forced either to leave the job or to face penalties for causing delay"). Greenwood has failed to submit sufficient evidence to fit within the scope of this asserted exception to the general rule.

Finally, the Shipowners contend there is insufficient evidence that they had *actual* knowledge of the stevedore's improvident judgment to continue operating the

crane, thereby negating the third *Scindia* duty.[13] The *Scindia* court held that this duty arises when the shipowner knows of the stevedore's "obviously improvident judgment" based on the fact that the shipowner "knew of the defect and that [the stevedore] was continuing to use it, [and therefore] should have realized the [defect] presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the [defect]." 451 U.S. at 175, 101 S.Ct. at 1626. We have interpreted this language as determining that "a vessel has a duty to intervene when it has actual knowledge of a dangerous condition and actual knowledge that the stevedore, in the exercise of 'obviously improvident' judgment, has failed to remedy it." *Pimental*, 965 F.2d at 17 (citing *Randolph*, 896 F.2d at 970; *Woods v. Sammisa Co.*, 873 F.2d 842, 854 (5th Cir.1989), *cert. denied*, 493 U.S. 1050, 110 S.Ct. 853, 107 L.Ed.2d 847; *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1037 (5th Cir.1983)). Therefore, in order to prevail under this third duty, the longshoreman must show not only that the shipowner had actual knowledge of the defect and of the stevedore's continuing use of the defective item, but also: "1) it had actual knowledge that the [defect] posed an unreasonable risk of harm and 2) actual knowledge that it could not rely on the stevedore to protect its employees and that if unremedied the condition posed a substantial risk of injury." *Randolph*, 896 F.2d at 971.

A difficulty in the above formulation is discerning what must be shown to demonstrate that a shipowner

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[13] Greenwood admits that this case does not implicate the second *Scindia* duty, and we agree.

had actual knowledge of a stevedore's "obviously improvident judgment" such that the shipowner "could not rely on the stevedore to protect its employees." The shipowner's obligation to intervene under the third *Scindia* duty "is narrow and requires 'something more' than mere shipowner knowledge of a dangerous condition." *Singleton v. Guangzhou Ocean Shipping Co.*, 79 F.3d 26, 28 (5th Cir.1996). This is because, " 'The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedore company.' " *Scindia*, 451 U.S. at 172, 101 S.Ct. at 1624 (quoting with approval *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 322, 84 S.Ct. 748, 753, 11 L.Ed.2d 732 (1964)); *see also Morris*, 832 F.2d at 71. Therefore, "It might well be 'reasonable' for the owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough." *Helaire*, 709 F.2d at 1039 n. 12. The question then is when should it become obvious to a shipowner that a stevedore's judgment – based on its specialized knowledge – is obviously improvident or dangerous. It seems to us that, consistent with *Scindia*'s basic thrust, in order for the expert stevedore's judgment to appear "obviously improvident," that expert stevedore must use an object with a defective condition that is so hazardous that anyone can tell that its continued use creates an unreasonable risk of harm even when the stevedore's expertise is taken into account. *Randolph*, 896 F.2d at 971; *Woods*, 873 F.2d at 847.

In this case, there exists sufficient evidence that the Shipowners were charged with knowledge of the defect, and knew of the stevedore's continued use of the crane.

However, there was insufficient evidence that the Shipowners had the *actual* knowledge that the operation of the crane with the doubtful slewing brake created an unreasonable risk of harm to the expert longshoremen. *See Randolph*, 896 F.2d at 971 (holding that although the defendants knew of the defect, "there was no evidence that the defendants were actually aware that an unreasonable risk of harm was thereby created"). Although one not operating the crane could see that it was "jerky," its thus observable malfunction was not so severe that the Shipowners – without any specialized knowledge and who were not operating it – would necessarily have known that it posed an unreasonable risk of harm.[14] In fact, after the accident, no report by either the stevedore, Logue, or the other longshoremen was made to the ship, and the crane continued to be used, without any slewing brake incident, for the remaining three days of unloading operations. There was simply no evidence that the fault in this slewing brake was such a serious defect that the

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[14] We have held a shipowner could properly be found to have had actual knowledge of an unreasonable risk evidencing the stevedore's "obviously improvident judgment," where the shipowner knew a defective winch was working improperly because it would temporarily repair the winch after each time that the winch "would slow down or stop unexpectedly causing pallets holding sacks of rice to swing precariously above the cargo hold." *Hernandez*, 841 F.2d at 586. However, in this case, since the Shipowners did not repair the slewing brake prior to the accident, and they were not made aware of its precise operational defects through some other form of close observation, there is no evidence that they had any actual knowledge that the erratic movement of the crane posed an unreasonable risk of harm.

expert stevedore's continued knowing use of it would be seen as "obviously improvident" by the Shipowners.

The evidence does not suffice to establish that the Shipowners violated any of the *Scindia* duties.[15]

Conclusion

For the reasons given, we reverse the judgment for Greenwood and render judgment for the Shipowners.

REVERSED AND RENDERED.

JOHNSON, Circuit Judge, dissenting:

This case turns on the first *Scindia* exception. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). Under that exception, a shipowner can be held liable if the shipowner "fails to warn on turning over the ship of hidden defects of which he should have know [sic]." *Pimental v. LTD Canadian Pac. Bul*, 965 F.2d 13, 15 (5th Cir. 1992). In the present case, the jury was instructed that in order for Greenwood to prevail, he must prove by a preponderance of the evidence that the defect, if any, was hidden and not obvious to a reasonably competent stevedore. When the jury returned its verdict, it found that the Shipowners were liable for Greenwood's injury. The majority reverses and renders, however, because it concludes that insufficient evidence exists to indicate that the defect was "hidden." In light of the substantial evidence in the record that a defect did exist and that such defect was unobservable and

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[15] Because of our conclusion in this respect, we do not reach the other issues raised by the Shipowners' appeal.

unknown to the stevedore before that time that Greenwood was injured, this conclusion is inexplicable.

In holding that insufficient evidence of a hidden defect exists, the majority relies entirely on the testimony of the crane operator at the time of the accident, Kenneth Logue. He testified that as soon as he began operating the crane he became aware that the crane was "a little jerky" and that when he put the crane in neutral, "it would continuously kept [sic] slewing for a little ways." Myopically clinging to this testimony, the majority concludes that the defect was open and obvious.[1]

Logue's testimony, however, was seriously challenged at trial. In particular, the Shipowners offered evidence that the defect in crane number four was not noticed by any other crew members. Wayne O'Neal, a highly experience [sic] crane operator with a gold star rating, operated crane number four from 8:00 a.m. to 9:00 a.m. He testified that he did not notice any problems with the crane. O'Neal's testimony was substantiated by both

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[1] In an attempt to find additional evidence to support its conclusion that the defect to the crane was open and obvious, the majority looks to the testimony of George Polinard. This individual testified that he observed all of the cranes and that they were not smooth at all, but rather they were jerky in their motions. However, Polinard never operated any of the cranes, and he worked on a different crane than Greenwood. Moreover, he did not observe the cranes on the day that Greenwood was hurt. Rather, Polinard's observations were made the following day. Even so, the majority chooses to cite this testimony and glosses over the testimony of the seven other witnesses who saw the accident and observed the particular crane involved at the relevant time.

the gang foreman, Quincy Guilford, and the walking foreman, Butch Hinman, who testified that they were aware of no problems with the crane during the relevant time period.

Additionally, four members of Greenwood's work gang, three of whom had experience operating cranes, testified as to their observations of the number four crane. All of these individuals observed the accident and the functioning of the crane before Greenwood was hurt. Based on these observations, the witnesses all testified that they were not able to visually detect any defect in the crane. This was also the testimony of the walking foreman, the gang foreman, and the ship's chief engineer. All three of these individuals had also observed the crane after work began and before the accident.

Defense counsel further attacked Logue's testimony by contending that no defect existed. Instead, the Shipowners claimed at trial that it was the negligence of Logue that caused the accident. Accordingly, defense counsel argued that Logue's testimony was either a falsification or a rationalization on Logue's part to shift the blame away from himself.[2]

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[2] In the Shipowners' opening statement, counsel argued as follows:

> I think that you will see evidence from co-workers form [sic] this particular gang of stevedores, these particular longshoremen, that will demonstrate to you that no one knew of any problem associated with these cranes, no one said there was any kind of problem with the crane's operation leading up until this accident. It's only after all this took place that we began to hear from Mr. Logue, "Oh, there was a problem with the crane that caused this to happen."

Lending support to the argument that Logue's testimony was a post hoc attempt to shift the blame is the testimony of the gang foreman, Guilford. Logue claimed that as soon as he got off the crane at 8:00 a.m., he

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Then, in closing arguments, defense counsel argued that the equipment was safe and that "what we're dealing with here is operator error, a problem on the part of Mr. Logue." Further, defense counsel stated that as he saw it, the bottom line

> in terms of whether there is a truly unreasonably dangerous condition on this crane comes down to Mr. Logue. But I don't take him in the abstract. I take him in the context of how we came to him in this case. He's the guy that's operating the crane at the time that Mr. Greenwood gets hurt. . . . Well, you know, the problem I've got with Logue's testimony is – is I see him as – as carrying around a lot of guilt. I see him as being in a situation where he's got to tell the guy something. We heard him say he told the guy he was sorry. And I think what he's doing here is he's telling us, "Look, I'm really sorry, but I've got to come up with something. I can't just tell the guy that I messed up. I can't tell the guy that it's my fault. I got to blame some inanimate object. I got to blame some foreigner, someplace that, you know, can't come in and answer for himself."

On appeal, however, the Shipowners change their story and claim that Logue's testimony concerning the defect should be believed. The majority alleges that judicial estoppel precludes Greenwood from relying on Logue's testimony to receive his judgment at trial and then turning around on appeal and repudiating that very testimony in an attempt to retain the judgment. See 111 F.3d at 1248. Notably though, the Shipowners are essentially doing the same thing. At trial, the Shipowners attempted to discredit Logue's testimony at every turn. Now on appeal, the Shipowners claim that Logue's testimony is correct and ask this court to disregard all of the evidence and testimony that the Shipowners provided at trial contradicting Logue.

reported the problems in the crane to Guilford. However, Guilford testified that he had no memory of any such report. Moreover, he testified that if Logue had made such a report to him, he would have immediately informed Hinman, the walking foreman. Hinman, in turn, testified that no one had reported any problems to him. From this evidence, a jury could easily conclude that no such report had been made.

The majority attempts to discredit all the evidence that contradicted Logue's testimony by claiming that the jury's verdict indicates that the jury believed Logue and no one else. The majority reaches this conclusion by contending that unless the jury believed Logue, they would have been unable to to find that crane number four was defective. I disagree. Even without using Logue's testimony, the jury could have found that crane number four was defective. Greenwood presented at trial other evidence of the defect in the form of maintenance records from the ship. These records state that the slewing brake on crane four was in "doubt" or "slight doubt" and that repairs had been made to the slewing brake with parts that were not recommended and that did not belong in the crane. From this evidence alone, the jury could have clearly deduced that crane number four was defective.

All the above evidence militates toward a finding that the defect was hidden; however, the majority simply ignores it. In spite of all of the evidence and the arguments questioning Logue's testimony, the majority has chosen to believe Logue completely. What the majority has done in this case is to credit the testimony it likes

from Logue and to discount all the evidence to the contrary. However, judging the credibility and believability of witnesses is the province of the jury. *See Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc), *overruled on other grounds, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc). We have repeatedly stated that it is not this court's job to reweigh the evidence and second-guess the jury. *See, e.g., Davis v. Odeco, Inc.*, 18 F.3d 1237, 1248 (5th Cir. 1994); *Davis v. First Nat'l Bank*, 976 F.2d 944, 950 (5th Cir. 1993). It is axiomatic that a jury is in an infinitely better position to judge the credibility of witnesses presented at trial. On appeal, we are limited to reviewing a cold and lifeless record, while a jury is able to physically observe the witnesses' demeanor and reactions as they testify. Put simply, "it is the function of the jury as the traditional finder of the facts, and not he [sic] Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Boeing*, 411 F.2d at 375; *see also Hindman v. City of Paris*, 746 F.2d 1063, 1068 (5th Cir. 1984).

The role of this court in reviewing the sufficiency of the evidence is to determine whether, after reviewing all the evidence in a light most favorable to the party opposing a motion for judgment as a matter of law, substantial evidence exists in the record to support the jury's verdict such that "reasonable and fairminded persons in the exercise of impartial judgment might reach different conclusions." *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982) (en banc). If so, the jury's verdict must be upheld. *See id.* Manifestly, the testimony of O'Neal, the crane operator, that he noticed no defects, the testimony of seven witnesses who stated that they were unable to

visually detect any defects, and the testimony of the foremen who stated that no one reported any problems to them is sufficient for a reasonable jury to conclude that this defect wad [sic] hidden and unknown to the stevedore. While the majority should be looking to see if substantial evidence exists to support the jury, it instead takes on the role of a fact finder. The majority in this case picks and chooses the evidence that it feels supports its theory of the case, while refusing to recognize the existence of credible evidence sufficient to uphold the jury's verdict.

CONCLUSION

There is clearly substantial evidence in the record such that a reasonable jury could conclude that the defect in crane number four was not open and obvious to the stevedore. The majority's conclusion to the contrary, based on its unwavering faith in the testimony of the crane operator to the exclusion of all other evidence, is difficult to comprehend. Accordingly, I respectfully dissent.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C. K. GREENWOOD, Plaintiff	§	
v	§	CIVIL ACTION No.
INDIAN OCEAN BULK CARRIERS AND SOCIETE FRANCAISE de TRANSPORTES MARITIME, Defendants	§	C-88-94

JUDGMENT

In this Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) action, Plaintiff C. K. Greenwood originally sued Defendants alleging that Defendants' negligence caused him to be struck in the face by one of the ship's malfunctioning cranes.

Following trial before a jury, interrogatories were propounded to the jury. *See* Order Granting Plaintiff's Motion For Entry of Final Judgment and Denying Defendants' Motion for Judgment Notwithstanding the Verdict of the Jury.

The jury's answers to the Interrogatories constitute jury findings on behalf of the Plaintiff, C. K. Greenwood. It is therefore

ORDERED and ADJUDGED that the Plaintiff, C. K. Greenwood be awarded $3,090,693 with prejudgment interest at the rate of 10% per annum beginning at a date

to be agreed on by the parties, to the date of this judgment, post-judgment interest of 4.21% as governed by 28 U.S.C. § 1961, and that Plaintiff recover his costs of action.

JUDGMENT rendered and entered this 4th day of March, 1992.

Eduardo E. de Ases
Eduardo E. de Ases
UNITED STATES
MAGISTRATE JUDGE

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C. K. GREENWOOD, Plaintiff v INDIAN OCEAN BULK CARRIERS AND SOCIETE FRANCAISE de TRANSPORTES MARITIME, Defendants	§ § § § § § § § § §	CIVIL ACTION No. C-88-94 (Filed March 5, 1992)

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT AND DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY

On December 9, 1991, a jury trial was initiated in the above-captioned action with the Honorable Eduardo E. de Ases, U.S. Magistrate Judge presiding. At the completion of the evidence and argument of counsel, the Court instructed the jury and submitted certain Special Interrogatories for them to answer. The Special Interrogatories and the jury's answers are set out below.

SPECIAL INTERROGATORIES

1. Was the crane in question unreasonably dangerous before Plaintiff C. K. Greenwood engaged in the cargo operations in question?

Answer "Yes" or "No"

Answer: Yes

If you answered "Yes" to Question 1, answer Question 2. Otherwise, STOP.

2. Do you find from a preponderance of the evidence that the Defendants knew or should have discovered that the crane in question was unreasonably dangerous before the Plaintiff C. K. Greenwood engaged in the cargo operations in question?

Answer "Yes" or "No"

Answer: Yes

If you answered "Yes" to Question 2, answer Question 3. Otherwise, STOP.

3. Do you find from a preponderance of the evidence that the hazard was one which was likely to be encountered by the Plaintiff's employer, the stevedore, as set out in the court's instructions?

Answer "Yes" or "No"

Answer: Yes

4. Did the negligence, if any, of those named below proximately cause the occurrence in question?

Answer "Yes" or "No" for each of the following:

A.	Plaintiff C. K. Greenwood	No
B.	Defendants Indian Ocean Bulk Carriers, Ltd. and Societe Francaise de Transportes Maritime	Yes

If you answered "Yes" to either of the Questions 4.A. or 4.B., answer Question 5. Otherwise, STOP.

5. What percentage of the negligence that caused the occurrence in question do you find to be attributable to each of the parties found by you to be negligent?

Answer by stating the percentage, if any, opposite each name. Your answer should total 100%.

A.	Plaintiff C. K. Greenwood	0 %
B.	Defendants Indian Ocean Bulk Carriers, Ltd. and Societe Francaise de Transportes Maritime	100 %
	TOTAL	100 %

Answer Question 6

6. From a preponderance of the evidence, what sum of money, if any, paid now in cash, would fairly and reasonably compensate C. K. Greenwood for the injuries, if any, he has sustained on the occasion in question.

In answering this question, do not reduce the amounts of your answers because of the negligence, if any, that you have attributed to Plaintiff C. K. Greenwood.

A.	Loss of earnings in the past	$ 264,000.
B.	Loss of earnings that, in reasonable probability, he will sustain in the future	$ 828,286.
C.	Physical pain, suffering and mental anguish suffered in the past	$ 342,857.

D.	Physical pain, suffering and mental anguish that he will suffer in the future	$ 684,127.
E.	Physical impairment in the past	$ 242,857.
F.	Physical impairment that, in reasonable probability, he will incur in the future	$ 642,857.
G.	Past medical expenses	$ 50,000.
H.	Future medical expenses	$ 180,000.

SO SAY WE ALL.

Thereafter, the parties filed:

1. Defendants' Motion to Disregard Jury Findings and Motion for Judgment Notwithstanding the Verdict – D.E. 67;

2. Plaintiff's Motion for Entry of Judgment – D.E. 66; and

3. Plaintiff's Motion for Costs of Interpretation – D.E. 73.

Both sides briefed their respective motions and filed responses thereto. D.E. 68, 69, 74, and 75.

DEFENDANTS' MOTION TO DISREGARD JURY FINDINGS AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. Defendants say the evidence is insufficient to support a judgment under the standard set in *Scindia*

Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). Defendants also cite *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990) in support of their contention that they could and did rely on the stevedore to avoid exposing Plaintiff to unreasonable hazards.

The jury heard evidence that crane #4, which caused Plaintiff's injuries, was defective prior to turnover to the stevedore. The ship's maintenance records show the crane's slewing brakes were either "doubtful" or in "slight doubt" and that the spares used were not recommended. *See* Ex. A., Plaintiff's Brief in Support of Motion for Entry of Judgment. D.E. 74. The person, who operated crane #4 when the accident occurred, testified the crane was malfunctioning and he informed the gang foreman. This witness' testimony was contradicted by another witness, who also operated crane #4 on the day of the accident. It is the jury's function to determine the facts from contradictory evidence and it did so by its answers to Special Interrogatories Nos. 1 through 5.

> "The Supreme Court's seminal decision in *Scindia Steam Navigation Co. v. De Los Santos* [451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981)] constructed the framework defining the shipowner's duty of care under § 905(b) (of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.). The Supreme Court held that before turning the vessel over to the stevedore, a shipowner must exercise due care to ensure that the ship and its equipment are in such a condition that the experienced stevedore 'will be able by the exercise of reasonable care to carry on its . . . operations with reasonable

> safety to persons and property.' (*Id.*, at 166-67, 101 S.Ct. at 1621-22). Only after a stevedoring operation is underway may the shipowner as a general matter 'rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards . . . ' (*Id.* at 170, 101 S.Ct. at 1623).
>
> "In addition, this circuit has recognized a pertinent exception to *Scindia's* broad statement of immunity for injuries occurring after stevedoring operations have begun: The vessel owner has a duty to intervene in the stevedore's operations when he has actual knowledge both of a hazardous condition and that the stevedore, in the exercise of 'obviously improvident' judgment, intends to continue work in spite of that condition. (*Randolph v. Laeisz*, 896 F.2d 964, 970 (5th Cir. 1990); other cites omitted)." *Gay v. Barge 266*, 915 F.2d 1007, 1012 (5th Cir. 1990).

The evidence is sufficient to sustain the jury's answers to Special Interrogatories Nos. 1 through 5.

B. Defendants urge that there is no evidence or insufficient evidence to support the jury's verdict or, alternatively, the verdict is contrary to the overwhelming evidence. Defendants say they are entitled to judgment as set forth in their Motion for Directed Verdict.

> "A directed verdict is appropriate only if, considering all of the evidence and drawing all inferences therefrom in favor of the nonmoving party, the court is convinced that no reasonable jury could find in favor of the nonmovant."

Miles v. Olin Corp., 922 F.2d 1221, 1224 (5th Cir. 1991), citing *Gay v. Barge 266*, 915 F.2d at 1011.

The Court is not so convinced. Defendants' contention that the verdict is unsupported or contrary to the evidence is without merit.

C. Defendants say the jury's verdict is insufficient because it does not contain a finding that the alleged hazardous condition of the crane was not an obvious or reasonably anticipated hazard.

The Court's instructions to the jury included the following:

> "In order to prevail on this claim, Plaintiff C. K. Greenwood must prove by a preponderance of the evidence that:
>
> "1. the Defendants knew about the hazard, or should have discovered it in the exercise of reasonable care;
>
> "2. the hazard was one which was likely to be encountered by the Plaintiff's employer in the course of his operations in connection with the Defendants' ship; and
>
> "3. the hazard was one which the plaintiff's employer, the stevedore, did not know about, and which would not be obvious to or anticipated by a reasonably competent stevedore in the performance of his work. Even if the hazard was one about which the Plaintiff's employer knew, or which would be obvious or anticipated by a reasonably competent stevedore, the Defendants must exercise reasonable care to avoid the harm to Plaintiff if the hazard was one which Defendants knew or should have known the Plaintiff's employer would not or could not correct and the Plaintiff could not or would not avoid.

> "Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. A risk is unreasonable only if it is of such magnitude as to outweigh what the law regards as a utility of the alleged negligent act or omission. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances."

See Court's Instructions to the Jury, pp. 7-8, D.E. 61.

Under the instructions of the Court, the jury found:

1. Defendants knew about the hazard;
2. the hazard was one likely to be encountered by the stevedore;
3. the hazard was not obvious to or anticipated by the stevedore; and
4. Defendants failed to exercise reasonable care to avoid injuring the Plaintiff.

Defendants argue that if the jury had found the hazard open and obvious, Defendants would have been relieved of the duty to warn the stevedore or the Plaintiff.

The evidence clearly showed Defendants failed to intervene after the stevedore continued to work despite the hazard. *Randolpf v. Laeisz*, 896 F.2d at 970. Based on the instructions from the Court, the jury found Defendants were negligent and this negligence was the proximate cause of Plaintiff's injuries. There was no request for special interrogatories inquiring into the possible contributory negligence of the stevedore or Plaintiff, nor

would such requests have been granted. It is no defense to the Defendants whether the hazard was open and obvious. *Stass v American Commercial Lies, Inc.*, 720 F.2d 879, 882 (5th Cir. 1983).

Defendants do not contend the charge given as a whole did not adequately reflect the applicable law and misled the jury. *Marshall v Neptune Maritime, Inc.*, 838 F.2d 737, 738 (5th Cir. 1987), citing *Coughlin v Capitol Cement Co.*, 571 F.2d 290, 300 (5th Cir. 1978) ("It is axiomatic that the court need not couch its charge in the precise language and form fancied by a litigant's attorney.").

The Court finds the jury's verdict is sufficient to support the finding that the alleged hazardous condition of the crane was not an obvious or reasonably anticipated hazard.

D. Defendants say a note, handed to counsel by a member of the jury after the verdict was received and the jury discharged, shows the jury "imposed their own standard of care on the Defendants in this case ignoring the Court's instructions." *See* D.E. 67, Exhibit A.

The note states, in part:

> "We the jury would like to make a statement to the industry as a whole. Keep your machinery in good or perfect working order. Too many times people have to work with faulty equipment. Industry wants to hurry up and get the job done. Slow down and work safely."

First, the jurors were carefully instructed they would violate their "sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court" or "to base a verdict upon anything other than the

evidence in the case." *See* Court's Instructions to the Jury, p. 1, D.E. 61. The jurors were also instructed they could "not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion." *Id.*, p. 2. There is nothing in the note and Defendants have not otherwise shown, that the jury failed to abide by the Court's instructions. *Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1273 (5th Cir. 1989).

Second, the language in the note addresses, as conceded by Defendants, "an undefined and generalized 'industry as a whole' ". *See* Defendants' Motion to Disregard Jury Findings and Motion for Judgment Notwithstanding the Verdict, p. 9, D.E. 67. There is nothing in the note to indicate Defendants were being singled out in the jury's message nor that the jury was attempting to become the "conscience of the community." *Guaranty Service Corp. v. American Employers Insurance Co.*, 893 F.2d 725, 729 (5th Cir. 1990).

Third, the note is not as stringent as Defendants interpret it. The jurors admonished the unidentified industry to keep its machinery in "good or perfect working order." *See* D.E. 67, Exhibit A.

Finally, Defendants cite no authority for the proposition that this note from the jury entitles them to a judgment.

It is therefore ORDERED that Defendants' Motion to Disregard Jury Findings and Motion for Judgment Notwithstanding the Verdict are DENIED.

PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT

Plaintiff alleges, generally, that he is entitled to judgment based on the jury's answers to Special Interrogatories 1, 2, 3, 4, and 5. Plaintiff says he is entitled to prejudgment interest and post-judgment interest both at the rate of 10% per annum, citing a state statute as authority for such interest.

A. In response to Plaintiff's Motion for Entry of Judgment, Defendants request that prejudgment interest be denied Plaintiff, acknowledging the Court of Appeals for the Fifth Circuit has authorized prejudgment interest in general maritime actions under § 905(b) and that the award of such interest is discretionary and ask for certain limitations on such award. Defendants also ask the Court to order a remittitur of the damages awarded by the jury that exceed the amounts proved up by Plaintiff and argued by Plaintiff's counsel.

The following is a listing of the damages awarded by the jury, the damages testified to by Plaintiff's economic expert and the amounts argued by Plaintiff's counsel:

Damages	Jury Award	Amounts Proved	Argued
Past Loss of Earnings	$264,000.	$253,000.	$264,000.
Future Loss of Earnings	$858,286.	775,000.	775,000.
Past Physical Pain, etc.	342,857.		250,000.

Future Physical Pain, etc.	684,127.		700,000.
Past Physical Impairment	242,857.		250,000.
Future Physical Impairment	642,857.		700,000.
Past Medical Expenses	50,000.	51,111.	50,000.
Future Medical Expenses	180,000.		100,000.

1. Plaintiff's proof of loss of earnings in the past was based on the testimony of an economics expert who testified he calculated Plaintiff's loss of earning in the past to be $253,000. The expert's calculations included his estimate of earnings by Plaintiff on the year in which Plaintiff was injured and disabled. The jury award was based on the argument of Plaintiff's counsel but does not demonstrate prejudice against Defendants or sympathy toward Plaintiff as Defendants contend.

2. "In *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983) *(en banc), cert. denied sub. nom. Heinrich Schmidt Reederi v. Byrd,* 467 U.S. 1252, 104 S.Ct. 3537, 82 L.Ed.2d 842 (1984) (*Culver II*) the Circuit *en banc* stated that:

> 'calculation of the lost income stream begins with the gross earnings of the injured party at the time of the injury. To this amount other income incidental to work, such as fringe benefits, should be added. From it, the fact-finder should subtract amounts the wage earner would

> have been required to pay such as income tax and work expenses.'

Culver II, 722 F.2d at 117." *Hernandez v. M/V Rajaan*, 841 F.2d 582, 587 (5th Cir. 1988).

The testimony of Plaintiff's expert showed the calculations he used in arriving at his conclusion that Plaintiff would suffer loss of future wages in the amount or $775,000 and this figure was discounted to present value. This witness also testified he had "used court-approved calculations to determine loss of wage earning capacity." This testimony was unchallenged by Defendants.

The jury's verdict that Plaintiff's loss of future wages amounts to $828,286 undoubtedly reflects the jury's conclusion that the amount testified to by the expert did not take into consideration potential wage increases which Plaintiff, based on his work history, would receive in the future.

3. The other findings of the jury concerning pain and mental anguish in the past and future, physical impairment in the past and future and past medical expenses basically follow the proof introduced by Plaintiff at trial with some upward and downward variations from the amounts argued by Plaintiff's counsel. Such findings are not clearly excessive beyond the maximum possible recovery for Plaintiff's injuries. Such findings reflect the jury's "observation of the plaintiff and its subjective determination of the amounts needed to achieve full compensation." *Hernandez*, 841 F.2d at 590, quoting *Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 632 (5th Cir. 1983).

4. Plaintiff's treating physician testified about future medical expenses and his opinion that such

expenses would be in the "six figure category" was unchallenged by Defendants. Coupled with the testimony of a psychologist that Plaintiff needs further treatment and counselling and that such treatment would be very expensive, the jury finding of future medical expenses in the amount of $100,000 is reasonable and based on the evidence presented.

B. It is therefore ORDERED that:

1. past loss of earnings be remitted to $253,000;

2. future loss of earnings be remitted to $775,000;

3. Plaintiff's damages are as follows:

Past loss of earnings	$ 253,000
Future loss of earnings	775,000
Past pain and mental anguish	342,857
Future pain and mental anguish	684,122
Past Physical Impairment	242,857
Future Physical Impairment	642,857
Past Medical Expenses	50,000
Future Medical Expenses	100,000
TOTAL	$3,090,693

4. Plaintiff is awarded prejudgment interest on the foregoing awards for past loss of earnings, past pain and mental anguish, past physical impairment and past medical expenses at the rate of 10% per annum, as set out in Art. 5069-1.05, Vernon's Texas Civil Statutes; and

5. Post-judgment interest is awarded at the rate authorized by 28 U.S.C. § 1961, currently 4.21%.

PLAINTIFF'S MOTION FOR COSTS OF INTERPRETATION

Plaintiff's claim for cost of translation of Defendants' ship's log is based on Fed.R.Civ.P. 43(f). This rule concerns compensation of a court-appointed interpreter. Here, Plaintiff obtained the services of a translator but made no request for the Court to confirm or approve such service. The translator testified that: (1) she translated the ship's log; (2) the translation was "true and accurate"; and (3) she spent "many hours" doing the translation. Plaintiff submitted the interpreter's affidavit showing the numbers of hours spent translating and the hourly rate charged. *See* Transcript of Jury Trial, Volume 2, pp 10-11, D.E. 79. It is

ORDERED that Plaintiff's Motion for Costs of Interpretation is hereby DENIED without prejudice. Plaintiff may submit authorities for his motion and Defendants will be given an opportunity to respond.

JUDGMENT ACCORDINGLY.

SIGNED this 4th day of March, 1992.

/s/ Eduardo E. de Ases
Eduardo E. de Ases
UNITED STATES
MAGISTRATE JUDGE

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7224

C K GREENWOOD;

Plaintiff - Appellee

NATIONAL UNION FIRE

Intervenor Plaintiff - Appellee

v.

SOCIETE FRANCAISE DE, Et Al

Defendants

SOCIETE FRANCAISE DE; INDIAN OCEAN BOAT CARRIERS

Defendants-Appellants

Appeal from the United States District Court for the Southern District of Texas, Corpus Christi

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 4/28/97, 5 Cir. ___, ___ F.3d ___)

Before JOHNSON, GARWOOD and JONES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is Denied and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Johnson, Circuit Judge, filed dissenting opinion.

APPENDIX "E"

AMENDMENT VII – CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub.L. 100-702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648 and amended Pub.L. 101-650, Title III, § 315, Dec. 1, 1990, 104 Stat. 5115.

Federal Court Rules

The Federal Rules of Civil Procedure, together with the Notes of the Advisory Committee, Law Review Commentaries, and the judicial constructions of the Rules, are published at the end of this Title for convenient reference.

Commentary on 1988 and 1990 Revisions

by David D. Siegel

Section 2072 was altered in 1988 and in 1990. The 1988 amendment produced present subdivisions (a) and (b), on the rule-making process. The 1990 amendment added subdivision (c), on what is "final" for appeal purposes. We treat the amendments in sequence.

Federal Rule – Making Procedure Altered

Section 2071 having addressed rule making by individual courts, §§ 2072-2074 address the general rule-making power of the U.S. Supreme Court and the procedures authorized in its exercise.

The old § 2072 of Title 28, empowering the U.S. Supreme Court to promulgate the general rules that govern practice and procedure in the federal courts (including such compilations as the Federal Rules of Civil Procedure) and prescribing the method of their promulgation, was repealed and replaced in an amendment contained in the Judicial Improvements and Access to Justice Act (Pub.L. 100-702) in 1988. The U.S. Supreme Court's rule-making power continues, but with a closer public and Congressional scrutiny provided. The new

§ 2072 is terser than its predecessor, but the terseness is more than compensated for by the enactment of two new sections, §§ 2073 and 2074, elaborating the rule-making steps.

The gist of the general rule-making power conferred on the U.S. Supreme Court by the old § 2072 is retained, but in a pithy subdivision (a). The equally terse subdivision (b) continues the instruction that no rules adopted under (a) may alter any substantive right, an instruction previously contained in the second paragraph of the superseded § 2072. Also in that paragraph was the direction that the rules not impair the right to trial by jury guaranteed by the Seventh Amendment. That direction is omitted, but without moment: no reminder is needed that neither a rule nor a statute can upset a constitutional requirement.

The second sentence of the new subdivision (b) of § 2072 was a key player in the 1988 act. It's the famous supersession clause, purporting to subordinate all "laws", including Acts of Congress, to the rules promulgated under subdivision (a). It was the wish of the House of Representatives that the supersession clause be repealed and that a more circumspect substitution be made for it, and so the House draft of § 2072 had it. (See page 3 of House Report 100-889, dated August 26, 1988, and Representative Kastenmeier's comments on the subject at pages 27-28.) But the Senate would not go along, and the amended § 2072(b) preserves the supersession clause with not even a verbal alteration. Viewing the supersession clause as "unwise and potentially unconstitutional" in its permitting the rules to "trump" existing

statutes. Representative Kastenmeier confessed his disappointment at the Senate's refusal to go along with its repeal, which he called "the single most important reform" contained in the House bill. (Congressional Record, Oct. 19, 1988, H-10440.)

For the role played by §§ 2073 and 2074 in the newly defined rule-making process, see the Commentaries on those provisions, below.

Rule Can Define "Finality" for Appeal Purposes

The Judicial Improvements Act of 1990 (Pub.L. 101-650) added subdivision (c) to § 2072. It permits the U.S. Supreme Court, through rules, to define the term "final" as used in § 1291 of Title 28. The rules under subdivision (c) would be made through the same process that governs the major rules compilations, like the Federal Rules of Civil Procedure.

Section 1291 is the statute that permits the appeal of a "final" decision of a district court, and there is an extensive and often perplexing caselaw on what "final" means, as acknowledged in the Report of the Federal Courts Study Committee (April 2, 1990), the committee set up under the 1988 act to make a further study of the federal courts and recommended additional changes. The report says (at page 95);

> Decisional doctrines – such as "practical finality" and especially the "collateral order" rule – blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review.

In the absence of rules on the matter, caselaw will continue to determine finality under § 1291.

It was the committee's hope that Congress would also permit the rules to expand the appealability of interlocutory determinations (report, pp. 95-96), which were restricted to those on the list in § 1292(a), but in this regard Congress did not oblige until 1992, and not in an amendment of § 2072, but of § 1292, where a subdivision (e) was added. See the Commentary on 28 U.S.C.A. § 1292.

Perhaps the most important, and surely the most litigious, of the categories of interlocutory orders from which § 1292(a) allows an immediate appeal are those relating to injunctions under paragraph (1) of the statute. Here there have been cases that have gone through torment in an endeavor to determine whether or not a given disposition qualified as an "injunction" so as to get up to an appellate court early on the authority of § 1292(a)(1). A graphic illustration of this occurred in the context of trying to determine the effect, under § 1292(a)(1), of a stay of a court action for the purpose of compelling the arbitration of the claim.

Is the stay for the arbitration purpose, or isn't it, an "injunction" for this appellate objective? It is quite an experience to trace the cases, some involving arbitration specifically and some not, built on a mass of technical points that finally overfed itself and was assigned to purgatory in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988). Cases along the way are familiar to many a student of federal practice. These cases include *Enelow v. New York*

Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440 (1935); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176 (1942); *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 69 S.Ct. 1067, 93 L.Ed. 1347 (1949); and *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233 (1955). A discussion of these cases and their role on the arbitrability scene appears in the Practice Commentary on § 16 in 9 U.S.C.A., the Federal Arbitration Act. (The original number assigned to that section was 15, but there was another § 15 in the title, dealing with the act of state doctrine, and the § 15 on appeals from arbitrability determinations was renumbered § 16 in 1990.)

APPENDIX "F"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

C. K. GREENWOOD,	§	
Plaintiff	§	
	§	
v	§	**CIVIL ACTION**
INDIAN OCEAN BULK CARRIERS AND SOCIETE FRANCAISE de TRANSPORTES MARITIME,	§	**No. C-88-94**
	§	
	§	
	§	
Defendants	§	

SPECIAL INTERROGATORIES

1. Was the crane in question unreasonably dangerous before Plaintiff C. K. Greenwood engaged in the cargo operations in question?

Answer "Yes" or "No"

Answer: yes

If you answered "Yes" to Question 1, answer Question 2. Otherwise, STOP.

2. Do you find from a preponderance of the evidence that the Defendants knew or should have discovered that the crane in question was unreasonably dangerous before the Plaintiff C. K. Greenwood engaged in the cargo operations in question?

Answer "Yes" or "No"

Answer: yes

If you answered "Yes" to Question 2, answer Question 3. Otherwise, STOP.

3. Do you find from a preponderance of the evidence that the hazard was one which was likely to be encountered by the Plaintiff's employer, the stevedore, as set out in the court's instructions?

Answer "Yes" or "No"

Answer: yes

4. Did the negligence, if any, of those named below proximately case the occurrence in question?

Answer "Yes" or "No" for each of the following:

A. Plaintiff C. K. Greenwood — no

B. Defendants Indian Ocean Bulk Carriers, Ltd. and Societe Francaise de Transportes Maritime — yes

If you answered "Yes" to either of the Question 4.A. or 4.B., answer Question 5. Otherwise, STOP.

5. What percentage of the negligence that caused the occurrence in question do you find to be attributable to each of the parties found by you to be negligent?

Answer by stating the percentage, if any, opposite each name. Your answer should total 100%.

A. Plaintiff C. K. Greenwood — 0 %

B. Defendants Indian Ocean Bulk Carriers, Ltd. and Societe Francaise de Transportes Maritime — 100 %

TOTAL — 100 %

Answer Question 6

6. From a preponderance of the evidence, what sum of money, if any, paid now in cash, would fairly and reasonably compensate C. K. Greenwood for the injuries, if any, he has sustained on the occasion in question.

In answering this question, do not reduce the amounts of your answers because of the negligence, if any, that you have attributed to Plaintiff C. K. Greenwood.

A.	Loss of earnings in the past	$264,000.
B.	Loss of earnings that, in reasonable probability, he will sustain in the future	$858,286.
C.	Physical pain, suffering and mental anguish suffered in the past	$342,857.
D.	Physical pain, suffering and mental anguish that he will suffer in the future	$684,127.
E.	Physical impairment in the past	$242,857.
F.	Physical impairment that, in reasonable probability, he will incur in the future	$642,857.
G.	Past medical expenses	$50,000
H.	Future medical expenses	$180,000.

SO SAY WE ALL.

/s/ Brian Mitchell
Foreman

Date 12-12-91